

2007

Pacificorp v. Eaglebrook Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PACIFICORP, dba UTAH POWER, an
Oregon corporation,

Appellant, and Cross-Appellee,

vs.

EAGLEBROOK CORPORATION, a Utah
corporation and R.C. TOLMAN, an
individual,

Appellees, and Cross-Appellants.

BRIEF OF CROSS-APPELLANTS

Appellate Case No. 20070358

Appeal from the final Orders of the Fifth Judicial
District Court, Washington County, Judge Eric A. Ludlow

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j). Pursuant to Utah Code Ann. § 78-2-2(4), the Utah Supreme Court poured this matter over to this Court on May 23, 2007. The Utah Supreme Court initially had jurisdiction of this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Appellees and Cross-Appellants (“Eaglebrook”) state the issues and standards of review for the first time, as the Appellant and Cross-Appellee (“PacifiCorp”) failed to file a brief in this matter.

Issue I: The Trial Court Abused Its Discretion By Not Awarding Attorney Fees to Eaglebrook Pursuant to Utah Code Ann. § 78-27-56.

Standards of Review: Whether PacifiCorp’s claims and defenses lacked merit is a question of law, requiring no deference to the trial court. *Jeschke v. Willis*, 811 P.2d 202, 204 (Utah Ct. App. 1991). Whether PacifiCorp acted in bad faith is a question of fact reviewed under the clearly erroneous standard. *Id.* Whether the non-award of attorneys’ fees to Eaglebrook was reasonable will be considered under an abuse-of-discretion standard. *Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988). Eaglebrook preserved this issue in its Response to Plaintiffs’ Objections to Order on Defendants’ Motion for Summary Judgment, R. at 250, and in oral argument on the motion.

Issue II: Eaglebrook Should Receive Their Fees and Costs on Appeal.

Standard of Review: None. The appellate court shall award just damages for a frivolous appeal. Utah R. App. P. 33(a).

DETERMINATIVE STATUTORY PROVISIONS AND RULES

Utah Code Annotated § 78-27-56. Attorney's fees -- Award where action or defense in bad faith -- Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Utah Rule of Appellate Procedure 33(a) & (b). Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

STATEMENT OF THE CASE

Nature of the Case

The main issue of this lawsuit is simple, to wit: Where does PacifiCorp's access easement to its Winchester Hills Substation exist. Unfortunately, this lawsuit became complicated because it was improperly formed by PacifiCorp from the beginning. The lawsuit was improperly formed as a result of PacifiCorp's failure to serve Eaglebrook with the initiating Complaint and the Motion for Preliminary Injunction and became more convoluted as PacifiCorp attempted to prosecute the case to cover up obvious procedural errors.

In its first pleading, Eaglebrook raised the issue that PacifiCorp failed to timely serve Eaglebrook with the Summons, Complaint or a copy of the Motion for Preliminary Injunction. PacifiCorp acknowledged it never served Eaglebrook with process. Despite PacifiCorp's awareness and admission of failing to serve Eaglebrook, PacifiCorp, in bad faith, continued to litigate the matter.

As a result of PacifiCorp's tactics, Eaglebrook was entirely without ability to properly or adequately defend this matter. The trial court judge who handled this case recognized the improper formation of this case and dismissed the action.

Further, the trial court found that PacifiCorp persisted in advancing an improperly formed case against good reason and caused Eaglebrook to defend in a void of pleadings and proper procedure, and, as a result, the court found that an award of attorney fees and costs

was proper. However, without explanation, the court only awarded minimal costs.

Course of Proceedings and Disposition Below

PacifiCorp commenced this action by filing the Complaint and a Motion for a Temporary Restraining Order and a Preliminary Injunction on April 1, 2005. On April 15, 2005, the trial court heard PacifiCorp's arguments and reviewed the pleadings in support of a preliminary injunction, all in the absence of service of process upon Eaglebrook. Additionally, Eaglebrook was not aware of the suit and could not make an appearance. Notwithstanding the lack of notice, or absence of Eaglebrook at the hearing on the preliminary injunction, on April 25, 2005, an Order was issued, granting the preliminary injunction.

By rule, PacifiCorp had until July 31, 2005 to serve Eaglebrook with the complaint and summons, but it was not until August 9, 2005, that Eaglebrook even became aware of the possibility of legal proceedings when R.C. Tolman was handed an Order for Preliminary Injunction by a Washington County Sheriff. At that time, Mr. Tolman did not receive a copy of the Complaint, nor a copy of the Motion for Preliminary Injunction. He only received an order out of the blue sky.

As Eaglebrook was now subject to an improper order, Mr. Tolman retained counsel to have the Injunction removed. On February 24, 2006, Eaglebrook petitioned the court to set aside the Preliminary Injunction. Through its petition, Eaglebrook raised the issue that process had not been served by PacifiCorp and the Injunction should be removed.

On March 6, 2006, PacifiCorp stipulated to set aside the Preliminary Injunction and requested a hearing. To Eaglebrook, it was entirely unclear why a hearing was necessary. Despite a lack of service and a moot issue relating to the Preliminary Injunction, on April 3, 2006, a hearing to have the preliminary injunction set aside was scheduled by the court for April 27, 2006. Between April 3, 2006 and April 27, 2006, no service of the Summons or Complaint, nor for that matter the Motion for Preliminary Injunction was made by the Plaintiff upon the Defendant. At the hearing, the court began a hearing on the Preliminary Injunction, but the short time scheduled by the court would not permit a full evidentiary hearing and the hearing was continued. The parties agreed to certain conditions which would allow the status quo to continue in terms of access to the sub-station. A request by the Plaintiff for proper service of both the Complaint and Motion was made at that time in the court's chambers to properly form the case.

The next hearing on the Motion for Preliminary Injunction was scheduled for June 26, 2006. On June 14, 2006, the parties stipulated to continue the hearing on PacifiCorp's Motion for Preliminary Injunction to July 26, 2006. The Complaint and Motion still remained undelivered despite multiple requests.

On July 18, 2006, the parties stipulated to continue the hearing again. This time the hearing was continued to September 25, 2006. As PacifiCorp remained non-compliant with the requests that service be effectuated, Eaglebrook had no choice but to push the issue of service. Either PacifiCorp had to prove to the court that effective service was rendered or the

matter should be dismissed.

On August 29, 2006, Eaglebrook filed a Motion for Summary Judgment and asked for reasonable attorney fees and costs. The Motion asserted that PacifiCorp had failed to prove service within 120 days of the filing of its Complaint and continued to prosecute the action under improper circumstances. PacifiCorp objected. Eaglebrook replied to the objection. On November 11, 2006, the District Court dismissed PacifiCorp's claims because the trial court lacked personal jurisdiction over Eaglebrook. PacifiCorp failed to appear at that hearing. Eaglebrook's counsel informed PacifiCorp's counsel of the court's ruling and gave opposing counsel the opportunity to object to the ruling in light of PacifiCorp's failure to appear at a properly noticed hearing.

On December 12, 2006, PacifiCorp filed an Objection to the Order on Defendants' Motion for Summary Judgment. PacifiCorp asserted it did not have an opportunity to be heard at the November 11, 2006 hearing because of miscommunications.

Taking a second bite at the apple, PacifiCorp also asserted that a dismissal should not be entered because Eaglebrook waived their opportunity to object to service and personal jurisdiction by presenting arguments on the merits in the case and by stipulating to the jurisdiction of the court.

On December 14, 2006, PacifiCorp requested a hearing on its Objections to Defendants' Order on Motion for Summary Judgment. PacifiCorp, in an abundance of caution, also filed a new civil action raising the same issues in another, new case.

On December 26, 2006, Eaglebrook filed an affidavit of counsel in support of the request for fees and costs made within the Motion for Summary Judgment. A hearing on PacifiCorp's Objections was held on February 12, 2007. On that date, the court heard full arguments from both sides and considered all of the pleadings of the parties on the issue of Summary Judgment.

On March 22, 2007, the trial court entered its final Order on the Defendant's motion for summary judgment and dismissed PacifiCorp's action, without prejudice. In the final Order, an award of attorney's fees and costs was found to be proper. Without explanation, the trial court only awarded costs in the amount of \$427.97.

PacifiCorp filed its notice of appeal to the Supreme Court of Utah on April 30, 2007. Eaglebrook filed its notice of cross appeal to the Supreme Court of Utah on May 10, 2007.

STATEMENT OF RELEVANT FACTS

PacifiCorp's Improperly Formed Action

If it did not already know beforehand, PacifiCorp should have become aware of its failure to serve Eaglebrook with the Summons and Complaint and the Motion for Preliminary Injunction when Eaglebrook filed its Petition to Set Aside the Preliminary Injunction. R. at 45-47. In the stipulation to dismiss the Preliminary Injunction, PacifiCorp's counsel stated that "unbeknownst to counsel, the Complaint had not been served upon the defendants prior to the hearing on Plaintiff's Motion for Preliminary Injunction." R. at 69. Also, PacifiCorp "conceded that service hadn't been made and that the defendants didn't have notice and

opportunity to be heard.” R. at 307. However, PacifiCorp “did not stipulate to the dismissal of this action.” R. at 307.

As the time for service had already passed, and PacifiCorp knew it could not prove service, PacifiCorp should have dismissed the instant matter and filed an new civil case as the present matter was terminally flawed. It did not take this logical course of action. Instead, PacifiCorp continued to litigate under the flawed case number.

PacifiCorp attempted to argue in defense of its actions that Eaglebrook submitted itself to the jurisdiction of the trial court by participating in the matter “regarding the merits of the case” and thereby “waived any right they may have had to challenge the jurisdiction of this Court.” R. at 152.

Responding to the fact that Eaglebrook had not made an appearance within 120 days of the filing of the Complaint, the court stated in its final Order that an award of attorney fees and costs was proper because of PacifiCorp’s persistence in advancing an improperly formed case against good reason. R. at 280.

PacifiCorp’s Bad Faith

In dismissing the case, the trial court found that an award of attorney fees and costs was proper because of the way PacifiCorp pursued its action. R. at 280.

From its initial pleading, Eaglebrook raised the issue of PacifiCorp’s failure to serve Eaglebrook. R. at 45-47. PacifiCorp admitted its lapse. R. at 69. PacifiCorp’s counsel also admitted, “We weren’t even aware that the defendants had not been served until after the

expiration of the 120 days.” R. at 307.

Notwithstanding its knowledge, PacifiCorp persisted in litigating under the instant case number. In defense, Eaglebrook was justified in taking the necessary steps to ferret out the issues relating to service and to defend against the improperly formed case and an invalid Preliminary Injunction that did impact Eaglebrook’s property rights until such time that the trial court could dismiss the action. R. at 280.

From the outset, PacifiCorp only made the case more complicated by its aggressive litigation stance and refusal to follow a common sense approach of refileing the case. In its final Order, the trial court noted that PacifiCorp improperly obtained the Preliminary Injunction Order, “which at that time had the color of law and was obtained under improper circumstances.” R. at 279. Clearly, PacifiCorp’s bad faith was shown by its improper and prideful persistence in pursuing a course of action having no foundation in law, e.g., that a case improperly formed can somehow be cured through more litigation and legal trickery.

In contrast, Eaglebrook made every attempt to allow PacifiCorp the opportunity to prove service and to provide pleadings to Eaglebrook to properly advance the case – assuming service was actually made. When requested, Eaglebrook continued hearings and even gave PacifiCorp an opportunity to object to a hearing on a dispositive motion it had failed to attend. R. at 107, 112, and 305. Eaglebrook even stipulated to the status quo of access for PacifiCorp’s maintenance vehicles as the parties sorted out the issues of service and the underlying factual circumstances relating to the core dispute. R. at Reporter’s

Transcript of April 27, 2006 hearing, p. 48.

In its final Order, the trial court found that PacifiCorp should have withdrawn its improperly formed action and simply filed a new action at the initial phases of this case after learning of its failure to properly and timely serve the Summons and Complaint. R. at 280. As a result of PacifiCorp's persistence in advancing an improperly formed case, the trial court found that an award of attorney fees and costs was proper. *Id.*

The Trial Court's Non-Award of Attorney Fees

Even though the trial court found that an award of attorney fees and costs was proper, court simply did not award any attorney fees to Eaglebrook. R. at 280-281. The trial court did not explain its reasoning or give any indication for why it did not award any attorney fees. R. at 277-282. Notwithstanding its request for fees and costs, and notwithstanding the trial court's willingness and indication that it would review and rule with respect to attorney fees, the trial court simply did not award any attorney fees. *See* R. at 281.

SUMMARY OF ARGUMENT

Issue I: **The Trial Court Abused Its Discretion By Not Awarding Attorney Fees to Eaglebrook Pursuant to Utah Code Ann. § 78-27-56.**

A. The trial court properly found that PacifiCorp persisted in advancing an improperly formed case against good reason and unnecessarily used the court's time and caused Eaglebrook to defend in a void of pleadings and proper procedure. PacifiCorp became aware of its failure to properly serve process through Eaglebrook's first pleading. Therefore,

PacifiCorp's action was wholly without merit once it knew it had failed to serve Eaglebrook with process.

B. PacifiCorp's bad faith in driving up legal costs of the Plaintiff was shown by first improperly obtaining the Preliminary Injunction without serving process, and then persisting in the action knowing it had failed to serve process on Eaglebrook. PacifiCorp must have known it did not serve process on Eaglebrook when it obtained the Preliminary Injunction. Even if it did not know then, PacifiCorp became aware of its failure when Eaglebrook filed its first pleading. From its initial pleading, Eaglebrook raised the fact that PacifiCorp had failed to serve Eaglebrook with process and that the Court lacked jurisdiction to hear the case. PacifiCorp persisted in asserting a cause of action that was without merit. As a result of PacifiCorp's bad faith persistence, Eaglebrook was forced to defend itself to the best of their ability until the trial court dismissed PacifiCorp's action, without prejudice.

C. The trial court's non-award of attorney fees was an abuse of discretion. The court found that PacifiCorp persisted in advancing an improperly formed case "against good reason" and that an award of attorney fees and costs was proper. An award of attorney fees would have only been "proper" if the action was meritless and not asserted in good faith, because Eaglebrook was not seeking attorney's fees under a theory of contract. Eaglebrook sought attorney fees under Utah Code Ann. § 78-27-56.

Eaglebrook prevailed in the action in obtaining a dismissal without prejudice. Therefore, Eaglebrook was entitled to the full amount of those attorney fees unnecessarily

expended as a result of PacifiCorp's meritless action and bad faith pursuit of that action. Eaglebrook provided the trial court with adequate evidence from which to determine the amount and reasonableness of those fees. PacifiCorp raised no specific objections to any fees or costs and should not be allowed to raise those objections for the first time on appeal.

Issue II: Eaglebrook Should Receive their Fees and Costs on Appeal.

The appellate court shall award just damages for PacifiCorp's frivolous appeal.

ARGUMENT

I. The Trial Court Abused Its Discretion By Not Awarding Attorney Fees to Eaglebrook Pursuant to Utah Code Ann. § 78-27-56.

Pursuant to Utah Code Ann. § 78-27-56, Eaglebrook was entitled to an award of attorney's fees.

A party is entitled to an award of attorney's fees under Utah Code Ann. § 78-27-56 if a court finds the following: (1) the action lacks merit; and (2) the action was not asserted in good faith. *Watkiss & Campbell*, 808 P.2d 1061, 1068 (Utah 1991); *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983); *Amica Mut. Ins. Co. V. Schettler*, 768 P.2d 950, 956 (Utah Ct. App. 1989). Where the prevailing party proves both elements, a trial court "has no discretion and must award reasonable attorney fees to the prevailing party." *Watkiss*, 808 P.2d at 1068. The determination of whether a claim or defense lacks merit is a question of law. *Jeschke v. Willis*, 811 P.2d 202, 204 (Utah Ct. App. 1991). On the other hand, "[a] finding of bad faith is a question of fact and is reviewed by this court under the 'clearly erroneous' standard." *Id.*

Moreover, “the trial court has broad discretion in determining what constitutes a reasonable fee, and [appellate courts] should consider that determination against an abuse-of-discretion standard.” *Dixie State Bank v Bracken*, 764 P.2d 985, 991 (Utah 1988).

A. PacifiCorp’s Action Was Meritless

PacifiCorp’s action was meritless. Whether a claim or defense lacks merit is a question of law. *Jeschke v. Willis*, 811 P.2d 202, 204 (Utah Ct. App. 1991). A claim lacks merit when it is “frivolous” or “of little weight or importance, having no basis in law or fact.” *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983). Here, the trial court found that PacifiCorp persisted in advancing an “improperly formed case against good reason” and unnecessarily used the court’s time and caused Eaglebrook to defend in a void of pleadings and proper procedure. R. at 280-281. Such a finding is the equivalent of concluding that PacifiCorp’s action was meritless.

If PacifiCorp did not already know, PacifiCorp became aware of its failure to serve Eaglebrook with the Summons and Complaint when Eaglebrook filed its Petition to Set Aside the Preliminary Injunction. R. at 45-47. After this, Eaglebrook and PacifiCorp entered into a stipulation to set aside the preliminary injunction and to request a hearing on the matter, wherein PacifiCorp’s counsel stated that “the stipulation is based upon the fact that, unbeknownst to counsel, the Complaint had not been served upon the defendants prior to the hearing on Plaintiff’s Motion for Preliminary Injunction.” R. at 69. PacifiCorp’s counsel “conceded that service hadn’t been made and that the defendants didn’t have notice and

opportunity to be heard.” R. at 307. However, at that time, PacifiCorp “did not stipulate to the dismissal of this action.” R. at 307.

Despite knowing it failed to serve Eaglebrook with process, PacifiCorp persisted in advancing its improperly formed case against Eaglebrook. PacifiCorp argued that Eaglebrook had submitted themselves to the jurisdiction of the trial court by participating in the matter “regarding the merits of the case” and thereby “waived any right they may have had to challenge the jurisdiction of this Court.” R. at 152. However, there is no basis in law or fact for such an argument with respect to failing to serve process on Eaglebrook, at least, not when Eaglebrook properly preserved the issue in its first pleading and never stopped raising its objection to the court’s lack of personal jurisdiction over Eaglebrook. Eaglebrook could not sit back and let PacifiCorp impair Eaglebrook’s rights. Out of necessity, Eaglebrook was forced to unwind what was done by PacifiCorp. Eaglebrook had to enter the fray until the trial court properly dismissed the action without prejudice to PacifiCorp.

Notwithstanding PacifiCorp’s waiver arguments, Eaglebrook never waived their right to service of process, even though Eaglebrook did raise other issues along with their objection to the court’s lack of personal jurisdiction. Again, out of necessity, Eaglebrook came before the trial court and raised the issue of lack of personal jurisdiction in its very first pleading, and, at the same time, Eaglebrook was forced to try and unwind what PacifiCorp had done. In other words, Eaglebrook was forced to defend themselves until the trial court properly dismissed the action.

During the continuances in this case, Eaglebrook continued to ask for proof of timely service and for service of the Summons and Complaint. R. *at passim*. Defendant's belief was that service may have been conducted by the Plaintiff upon the resident agent or other officer or even a state agency without the knowledge of the principal of Eaglebrook, e.g., Plaintiff may have made service to another officer or person acceptable under the rules. However, PacifiCorp never proved service of a summons and complaint upon Eaglebrook or any other acceptable party—ever. Even to this day, no such proof has been established.

In short, though service was not made upon Eaglebrook, the possibility existed that Plaintiff could have served another acceptable person or even the state of Utah on Eaglebrook's behalf. Before filing a dispositive motion, Eaglebrook needed to know, in good faith, if any such alternative service was made and PacifiCorp. This reasonable approach certainly justifies Eaglebrook's work in the interim before seeking dismissal. Eaglebrook only moved the court for dismissal after it was painfully obvious that PacifiCorp could not prove timely service and was only postponing the inevitable.

With respect to presenting and preserving defenses and objections, Rule 12(b) of the Utah Rules of Civil Procedure states, "No defense or objection is waived by *being joined with one or more other defenses or objections* in a responsive pleading or motion or by further pleading after the denial of such motion or objection." (emphasis added). With respect to waiver of defenses, Rule 12(h) states, "A party waives all defenses and objections not presented either by motion or by answer or reply . . ." Utah R. Civ. P. 12(h).

In essence, PacifiCorp argued that Eaglebrook waived service of process by joining other defenses and issues with the personal jurisdiction issue. In light of PacifiCorp's arguments, it is instructive to note what the *Curtis v. Curtis*, 789 P.2d 717, 725, n. 17 (Utah Ct. App. 1990) court said with respect to waiving personal jurisdiction by a "general appearance":

The doctrines of "general" and "special" appearance, relied on by the court, are associated with personal jurisdiction only. *Prior to the adoption of Rule 12(b) of the Rules of Civil Procedure, a party was required to allege lack of personal jurisdiction and other jurisdictional defects separately from other nonjurisdictional defenses.* "[I]f a challenge of this type was joined with any nonjurisdictional defenses, the appearance became 'general' and the party's right to object to jurisdiction was deemed waived." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1362 (1969). *Today the distinction between general and special appearances has been effectively abolished by Rule 12(b), which permits jurisdictional and nonjurisdictional defenses to be joined.* See generally *id.* at § 1344. See also *Ted R. Brown & Assocs., Inc. v. Carnes Corp.*, 547 P.2d 206, 207 (Utah 1976) (defendant has not made a general appearance by making a motion to release attachment).

(emphasis added). Accordingly, prior to the adoption of Rule 12(b), Eaglebrook may have waived its right to object to jurisdiction by joining other "nonjurisdictional" defenses with its initial pleading. However, today, Rule 12(b) of the Utah Rules of Civil Procedure clearly permits jurisdictional and nonjurisdictional defenses to be joined by a party without that party incurring a waiver of the right to object to jurisdiction.

In this case, Eaglebrook raised the issue of lack of personal jurisdiction in its first and subsequent pleadings and at the hearings in this case. *R. at passim.* Eaglebrook based its objection to jurisdiction on Rule 4(b)(i) of the Utah Rules of Civil Procedure:

In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint *shall be served no later than 120 days after the filing of the complaint* unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, *the action shall be dismissed*, without prejudice on application of any party or upon the court's own initiative.

(emphasis added). In this case, Eaglebrook was not served within 120 days after the filing of the complaint; no request for an extension to serve was ever filed; no good cause for not serving the summons and complaint within the 120 days was ever demonstrated; and Eaglebrook did not waive service of process. Even more importantly, Eaglebrook never made a general appearance, nor did it argue any substantive matters within this same time period. Therefore, the action “shall be dismissed” if the summons and complaint are not timely served. Utah R. Civ. P. 4(b)(i). If the action is dismissed under Rule 4(b)(i), then such dismissal is without prejudice. *Id.*

The trial court found that PacifiCorp failed to serve the summons and complaint within 120 days of its filing of the Complaint and that Eaglebrook did not waive service of process, and therefore, the trial court found that PacifiCorp’s complaint must be dismissed without prejudice. R. at 279-280. The trial court also found that the language of Rule 4(b)(i) “is mandatory and requires dismissal of any actions not timely served, and that such a dismissal is without prejudice to [PacifiCorp].” R. at 278.

In its final Order, the trial court found the following with respect to PacifiCorp’s persistence in advancing its action despite its failure to serve Eaglebrook with the Complaint:

This Court finds that as [PacifiCorp] did not take the simple step of withdrawing this case, but persisted in advancing an improperly formed case against good reason, and as [PacifiCorp] has unnecessarily used the Court's time and caused [Eaglebrook] to defend in a void of pleadings and proper procedure, an award of attorney fees and costs is proper.

R. at 280. In essence, what the trial court found is that PacifiCorp's action was meritless once PacifiCorp knew of its failure to serve Eaglebrook with process.

Because of its knowing failure to timely serve process on Eaglebrook, PacifiCorp's action was wholly without merit.

B. PacifiCorp's Bad Faith Was Evident from its Actions and Inaction Prior to and During the Lawsuit

PacifiCorp's bad faith in the instant case is well-documented and the court seems to support that finding in its ruling and award of costs. Whether PacifiCorp's actions or inaction amounted to bad faith is a question of fact, and the trial court's findings must be upheld unless "clearly erroneous." *Jeschke v. Willis*, 811 P.2d 202, 204 (Utah Ct. App. 1991). PacifiCorp's duty on appeal is to "marshall the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence, thus making them 'clearly erroneous.'" *Ohline Corp. V. Granite Mill*, 849 P.2d 602, 604 (Utah Ct. App. 1993)(citing *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991). Absent such marshaling, the court must presume the correctness of the trial court's findings. *Interwest Construction v. Palmer*, 923 P.2d 1350, 1360 (Utah 1996). PacifiCorp has not filed a brief, but does have an opportunity to respond to

Eaglebrook's brief and there marshal! the evidence to attempt to show that the trial court's findings are "clearly erroneous."

Moreover, in this case, the trial court's finding that PacifiCorp persisted in advancing an improperly formed case against good reason and unnecessarily used the Court's time and caused Eaglebrook to defend in a void of pleadings and proper procedure, R. at 280, is equivalent to finding that PacifiCorp's bad faith was amply supported by the record.

PacifiCorp's bad faith was shown by its actions and inaction by obtaining the Preliminary Injunction without giving Eaglebrook notice and an opportunity to be heard, and representing to the trial court otherwise, and then persisting in the action knowing it had failed to serve process on Eaglebrook. PacifiCorp must have known that it did not serve process on Eaglebrook when it obtained the Preliminary Injunction. Such process is fundamental to a lawsuit. Either you serve process or you fail to serve process. PacifiCorp was given adequate time to verify whether service was effectuated.

However, even if PacifiCorp did not really know it failed to serve process on Eaglebrook at the time it obtained the Preliminary Injunction, then PacifiCorp became aware of its failure when Eaglebrook filed its first pleading. R. at 45-47. From that initial pleading, and throughout the lawsuit, Eaglebrook raised the fact that PacifiCorp had failed to serve Eaglebrook with process and that the Court lacked jurisdiction to hear the case. R. at passim. PacifiCorp never denied the fact that Eaglebrook never received service of process. PacifiCorp professed that they "weren't even aware" that PacifiCorp completely failed to

serve process on Eaglebrook. R. at 307.

Notwithstanding being fully aware and representing to the court and opposing counsel that it failed to serve Eaglebrook with process, PacifiCorp persisted in asserting a cause of action that was without merit. As a result of PacifiCorp's bad faith persistence, Eaglebrook was forced to defend itself to the best of their ability, and incurred attorney fees and costs.

Again, PacifiCorp never denied the fact that Eaglebrook never received service of process. In fact, PacifiCorp's own counsel admitted that "unbeknownst to counsel, the Complaint had not been served upon [Eaglebrook] prior to the hearing on [PacifiCorp's] Motion for Preliminary Injunction." R. at 69. "We weren't even aware that the defendants had not been served until after the expiration of the 120 days." R. at 307.

At the Hearing on April 27, 2006, PacifiCorp's counsel apologized to the trial court and counsel:

The last time we were down here a year ago arguing this preliminary injunction Mr. Tolman was not represented. It was a result of a mix up in our St. George office to get Mr. Tolman served. I apologize to the Court for not having caught that, and I apologize to Mr. Tolman as well.

R. at 305.

The record that has already been referenced speaks loudly of PacifiCorp's bad faith in this case. However, one more experience in dealing with PacifiCorp in this action deserves special attention because it demonstrates the fabian policy employed by PacifiCorp. After the November 16, 2006 hearing, PacifiCorp complained that "[d]ue to a series of apparent

miscommunications ... PacifiCorp did not have the opportunity to be heard at that hearing.” R. at 178. PacifiCorp’s counsel stated that he was ill during the week of the November 16, 2006 hearing, and that on November 15, 2006, he personally contacted the trial court’s scheduling clerk “to advise her of his illness and to ask that the hearing be continued.” R. at 182. PacifiCorp’s counsel stated that the trial court clerk “advised him that the matter would be stricken from the calendar.” *Id.* PacifiCorp’s counsel asked the trial court clerk “what he needed to do so that the hearing would be continued” and he was advised that “he should contact opposing counsel.” *Id.* PacifiCorp’s counsel represented that the trial court clerk “did not tell Mr. Rampton that he should file a motion to continue or that he should have another attorney from his office appear.” R. at 183. PacifiCorp’s counsel then represented that he did contact opposing counsel “that same day and advised them that the hearing would be continued.” *Id.*

The truth is that PacifiCorp did have notice and an opportunity to be heard at the November 16, 2006 hearing and any “miscommunications” about that hearing being continued were a result of PacifiCorp’s counsel’s actions or inaction. *See* R. at 243-244. Counsel for Eaglebrook learned that counsel for PacifiCorp told the trial court’s clerk that there was an agreement between counsel to continue the matter and that Eaglebrook’s counsel would appear at the hearing on November 16, 2006 to request a continuance. R. at 243. No such agreement existed between counsel for the parties. *Id.* In addition, counsel for PacifiCorp represented to counsel for Eaglebrook that the court had taken the matter off

calendar. when in fact, the court had not taken the matter off calendar. R. at 243-245. Eaglebrook's counsel never agreed to a continuance prior to and regarding the November 16, 2006 hearing. *Id* It was only by chance that Eaglebrook's counsel learned of the "apparent miscommunication" and barely made an appearance at the hearing. R. at 244.

As a result of PacifiCorp's counsel's fabian actions and inaction, Eaglebrook's rights were prejudiced, again, in that Eaglebrook's counsel was not adequately prepared to appear at the November 16, 2006 hearing, even though Eaglebrook's counsel did appear and the trial court did order the case dismissed at that time. R. at 244. At the November 16, 2006 hearing, the trial court judge stated the following:

The record should reflect that today is the time set for these motions, that Mr. Rampton, although the indication is that he is ill, the record should reflect that Mr. Rampton is involved as a partner in a very large firm out of Salt Lake City, also has an office here in St. George. The matter has not been continued. Mr. Rampton is not present.

R. at 306. In addition, Eaglebrook's counsel represented to the trial court that if PacifiCorp's counsel had sent a representative to the court that Eaglebrook's counsel "would have been more than happy to continue this under any circumstance." *Id*. In reply, the trial court judge stated the following:

Counsel, that's what's a little troubling to the court. They should have had some representative here. They should have called ahead of time. The court did not take the matter off the calendar.

R. at 306.

In its final Order dismissing the action, the trial court found that “as [PacifiCorp] did not take the simple step of withdrawing this case, but persisted in advancing an improperly formed case against good reason, and as [PacifiCorp] has unnecessarily used the Court’s time and caused [Eaglebrook] to defend in a void of pleadings and proper procedure, an award of attorney fees and costs is proper.” R. at 280. Even assuming, for the sake of argument, that PacifiCorp asserted the lawsuit with a good faith belief in its claims, once Eaglebrook filed its initial pleading, PacifiCorp could no longer have held a good faith belief that its improperly formed action could be asserted in good faith.

In the State of Utah, if a party fails to serve process on the opposing party, then Rule 4(b)(i) of the Utah Rules of Civil Procedure dictates that the action shall be dismissed without prejudice. The only exception to serving outside the 120 day time limit is found in the rule itself, wherein it states that “the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint *unless the court allows a longer period of time for good cause shown.*” Utah R. Civ. P. 4(b)(i) (emphasis added). Here, PacifiCorp never asked the court to allow service of the summons and complaint beyond the 120 days and never showed any good cause why service was never effectuated.

Rule 65A(a)(1) of the Utah Rules of Civil Procedure states, “No preliminary injunction shall be issued without notice to the adverse party.” There is no exception to this rule. *See* Utah R. Civ. P. 65A. However, the Preliminary Injunction was issued without notice to Eaglebrook, and Eaglebrook can only assume that PacifiCorp represented to the court that

notice was given. Otherwise, it is not known how the court could issue such an injunction without adhering to the basic rules of notice and opportunity to be heard as dictated by Rule 65A, the Utah Constitution and the United States Constitution, when life, liberty, or property is in jeopardy.

Formal service of process is a “bedrock principle” of our nation’s legal system: “An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process.” *Murphy Bros., Inc. V. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, ¶ 11 (1999). Article I, Section 7 of the Utah Constitution states, “No person shall be deprived of life, liberty or property, without due process of law.” The companion due process clause in the United States Constitution is found in the Fifth Amendment, which states, “No person shall . . . be deprived of life, liberty, or property, without due process of law[.]” In regards to service of process, the United States Supreme Court has held:

Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant. At common law, the writ of *capias ad respondendum* directed the sheriff to secure the defendant's appearance by taking him into custody. The requirement that a defendant be brought into litigation by official service is the contemporary counterpart to that writ.

In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. Accordingly, one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority asserting measure stating the time within which the party served must appear and defend. *Unless a named defendant agrees to waive service, the summons continues to function as the sine qua non directing an*

individual or entity to participate in a civil action or forgo procedural or substantive rights.

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999)(citations omitted)(emphasis added). Utah case law, statutes and rules agree with the Utah Constitution and United States Constitution. The Utah Supreme Court stated the following with respect to service of process:

[D]ue process is not a technical conception with a fixed content unrelated to time, place, and circumstances. Instead, due process is flexible and, being based on the concept of fairness, should afford the procedural protections that the given situation demands. *The minimum requirements are adequate notice and an opportunity to be heard in a meaningful manner.* To be considered a meaningful hearing, the concerns of the affected parties should be heard by an impartial decision maker. In addition, a record is helpful to allow for judicial review, though where not available or complete, the reviewing court must be allowed to determine the facts to ensure due process was given.

Dairy Prod. Servs., Inc. v. City of Wellsville, 13 P.3d 581, 593 (Utah 2000) (quotations and citations omitted)(emphasis added).

At the very least, Eaglebrook should have been given adequate notice and an opportunity to be heard in a meaningful manner. PacifiCorp represented that it was unaware of its fundamental failure to serve process on Eaglebrook. R. at 307. Eaglebrook was not given notice or the opportunity to be heard as required by due process standards. Also, Eaglebrook did not waive its right to notice and the opportunity to be heard.

Taken in isolation, such a basic and fundamental failure to serve process on an opposing party may be curable and excusable under certain circumstances, however, in this

case, after 120 days had passed, given PacifiCorp's fabian policy before and during the action, PacifiCorp's failure to serve process and persistence in pursuing a fatally flawed action against Eaglebrook, in the face of clear binding legal authority, is nothing more than a manifestation of bad faith.

The Supreme Court of Utah has instructed us on how to determine whether or not a party has acted in bad faith:

To find that a party acted in 'bad faith', the trial court must find that one or more of the following factors existed: (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with knowledge that the activities in question would hinder, delay, or defraud others.

Valcarce v. Fitzgerald, 961 P.2d 306, 316 (Utah 1998)(referencing *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983). As explained above, the trial court in this case found that PacifiCorp "proceeded to litigate the case as if service had been rendered within the 120 days, which it had not." R. at 279. After Eaglebrook's initial pleading, PacifiCorp knew it failed to serve process on Eaglebrook and admitted the same when it stipulated to vacate the Order for the Preliminary Injunction. R. at 69. Again, as a result of PacifiCorp's knowing failure to serve process on Eaglebrook, and persistence in light of that knowing failure, the trial court found that an award of attorney fees and costs was proper. R. at 280.

The findings by the trial court illustrate the court's conviction that PacifiCorp lacked an honest belief in the propriety of their litigation activities, that PacifiCorp intended to take

unconscionable advantage of Eaglebrook, and that PacifiCorp acted with the knowledge that its activities would hinder, delay, or defraud Eaglebrook in the litigation. *See* R. at 277-281. As was found in *Valcarce v. Fitzgerald*, the trial court specifically found that one or more of the *Cady* factors existed and was not required to expressly use the magic words “bad faith” in determining the applicability of Utah Code Ann. § 78-27-56. *See* 961 P.2d at 316.

With respect to the trial court not using the magic words “bad faith”, the *Valcarce* court stated that even though “it would be better practice for trial judges to list the specific statutory elements” required under section 78-27-56, the Supreme Court of Utah adheres to the following assumption:

[I]n cases in which factual issues are presented to and must be resolved by the trial court but no findings . . . appear in the record, we “assume that the trier of facts found them in accord with its decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it.

Valcarce, 961 P.2d at 316 (quoting *State v. Ramirez*, 817 P.2d 774, 787 (Utah 1991), *cert. denied*, 857 P.2d 948 (Utah 1993)). Moreover, the appellate court will “uphold the trial court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings.” *Id.* at 316 (quoting *Ramirez*, 817 P.2d at 788, n. 6). In addition, the *Valcarce* court stated that the “question is whether there is evidence from which the trial court could reasonably have entered a finding of bad faith.” *Id.*

The trial court’s findings give plenty of room to reasonably assume that the trial court actually made a finding of bad faith on the part of PacifiCorp, and that PacifiCorp’s action

was meritless once it knew its action was improperly formed and that it could have simply withdrawn the matter and re-filed the action. *See* R. at 280. Instead, PacifiCorp persisted, in bad faith, in a non-meritorious action. As a result, the trial court found that an award of attorney fees and costs was proper. *See* R. at 280.

In Utah, attorney fees are awarded only when authorized by statute or by contract. *Jensen v. Sawyers*, 130 P.3d 325, 348 (Utah 2005). In this case, the trial court found that “an award of attorney fees and costs is proper.” R. at 280. The only possibility for finding that attorney fees and costs were proper is if the trial court found attorney fees were authorized under Utah Code Ann. § 78-27-56, as attorney fees were not pursued under contract.

It is important to note that once faced with the Motion for Summary Judgment, PacifiCorp did file a new action, but still refused to voluntarily dismiss the old action, R. at 307, choosing instead to continue to pursue the matter and then to appeal the matter once it was dismissed.

The following findings by the trial court are sufficiently specific in referring to the issue of bad faith: PacifiCorp should have withdrawn the action at the initial phases of the trial after learning of its failure to properly and timely serve the Summons and Complaint; PacifiCorp did not take the simple step of withdrawing the action, but persisted in advancing an improperly formed case “against good reason”; PacifiCorp “unnecessarily used the Court’s time and caused [Eaglebrook] to defend in a void of pleadings and proper procedure”; and “an award of attorney fees and costs is proper.” R. at 280. Therefore, the

trial court should have awarded reasonable attorney fees along with the costs that were awarded.

C. The Trial Court's Non-Award of Attorney Fees is Patent Error or a Clear Abuse of Discretion

“The award of attorney fees is a matter of law, which we review for correctness.” *Jensen v. Sawyers*, 130 P.3d 325, 348 (Utah 2005)(referencing *Paul DeGroot Bldg. Servs., L.L.C. v. Gallacher*, 112 P.3d 490 (Utah 2005)). “[A] trial court has ‘broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard.’” *Id.* at 348 (quoting *Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988)). “[T]he trial court is allowed to reduce the amount asserted by one party in determining a reasonable fee.” *Dixie State Bank*, 764 P.2d at 989; *see also* Utah Code Ann. § 78-27-56.

In this case, the trial court found that “an award of attorney fees and costs is proper.” R. at 280. However, even though it found that attorney fees and costs were proper, the trial court only awarded \$427.97 in costs and \$0.00 in attorney fees. R. at 281. By the time the trial court entered its order awarding the \$427.97 in costs and \$0.00 in attorney fees, Eaglebrook had requested a total of Eighteen Thousand Six Hundred and Eight Dollars and no Cents (\$18,608.00) for attorney fees, and had submitted two affidavits of counsel in support of the request for those attorney fees, wherein the fees were detailed by affidavits and the attached invoices and could have been reviewed by the trial court judge. R. at 198-219,

and 268-272.

The non-award of attorney fees was patent error or a clear abuse-of-discretion given the fact that the trial court found that PacifiCorp's action was meritless and brought or asserted in bad faith and given the fact that the trial court found that an award of attorney fees and costs was proper. R. at 280. An award of attorney fees would have been "proper" only if the action was meritless and not asserted in good faith, as required by Utah Code Ann. § 78-27-56.

More specifically, Utah Code Ann. § 78-27-56(1) states that the court "*shall* award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or *asserted* in good faith[.]" (emphasis added). However, in this case, even though the court found that an award of attorney fees and costs was proper, and even though Eaglebrook was the prevailing party, the court only awarded costs and did not award any attorney fees to Eaglebrook. R. at 281.

There is provision in Utah Code Ann. § 78-27-56(2) for the court to not award attorney fees:

The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but *only if the court*:

- (a) finds the party has filed an affidavit of impecuniosity in the action before the court; or
- (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

(emphasis added). In this case, the trial court made no findings with respect to any affidavit

of impecuniosity, nor did the trial court enter in the record any reason for not awarding attorney fees under § 78-27-56(1), as is required under § 78-27-56 in order to award no fees after having found that fees were proper.

In other words, Utah Code Ann. § 78-27-56 makes an award of attorney fees mandatory if the action was without merit and not brought or asserted in good faith, unless the court specifically finds the party filed an affidavit of impecuniosity in the action or the court enters in the record the reason for not awarding fees. As explained above, the trial court made no finding with respect to any affidavit of impecuniosity, and further, the court did not enter in the record the reason why it did not award fees to Eaglebrook.

Eaglebrook was entitled to the full amount of those attorney fees unnecessarily expended as a result of PacifiCorp's meritless action and PacifiCorp's bad faith pursuit of its action. Eaglebrook provided the trial court with adequate evidence from which to determine the amount and reasonableness of those fees, and PacifiCorp raised no specific objections to any fees or costs and should not be allowed to raise those objections for the first time on appeal.

The Utah Supreme Court has stated the following with respect to an award of fees that is less than what the trial court found to be reasonable:

[I]f reasonable fees are recoverable by contract or statute and the trial court considers all pertinent factors and determines in the exercise of its sound discretion that a specific sum is a reasonable fee, *it is a mistake of law to award less than that amount*. Stated another way, the trial court has broad discretion in determining what constitutes a reasonable fee, and we will

consider that determination against an abuse of discretion standard. However, *once the trial court makes that determination in the exercise of its sound discretion, it commits legal error if it awards less than the reasonable fee to which the successful litigant is entitled.*

Dixie State Bank, 764 P.2d at 991 (emphasis added). In this case, the trial court found that an award of attorney fees and costs was “proper.” R. at 280. However, for an unknown reason, the court did not award any fees, it only awarded costs, even though the court found that PacifiCorp persisted in advancing an improperly formed action against good reason and unnecessarily wasted the court’s time and forced Eaglebrook to defend in a vacuum of pleadings and proper procedure. R. at 280. The result is that the court committed patent error or abused its discretion by awarding less than a reasonable fee to which Eaglebrook was entitled.

The trial court did not award attorney’s fees even for Eaglebrook’s counsel’s having to object to the improperly obtained Preliminary Injunction; or for the Motion for Dismissal/Summary Judgment and the November 11, 2006 hearing which was not attended by PacifiCorp’s counsel; or for PacifiCorp’s objection to the November 11, 2006 order, which objection was not recognized by the court, but only caused additional delay and expense. Though PacifiCorp may argue that some of the activity conducted by counsel in this action may be duplicative of work that may be necessary in the new case, it would be improper for the court to consider what work in another case may or may not be necessary. The point is, that in this case, none of the work was necessary, as the case was not properly

formed in the beginning and was improperly advanced. Any benefit to Eaglebrook for legal work conducted in the earlier case will be minimal at best, as much time has now passed and counsel will need to refresh itself again in the new matter.

Therefore, the trial court committed patent error or abused its discretion by failing to award attorney's fees to Eaglebrook in light of PacifiCorp's bad faith pursuit of a meritless action.

D. Eaglebrook's Attorney's Fees Were Reasonable

"[T]he trial court has broad discretion in determining what constitutes a reasonable fee, and [appellate courts] will consider that determination against an abuse-of-discretion standard." *Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988). Eaglebrook requested a total of Eighteen Thousand Six Hundred and Eight Dollars and no Cents (\$18,608.00) for attorney fees and submitted two affidavits of counsel in support of the request for those fees, which fees were detailed by the affidavits and attached invoices. R. at 198-219, and 268-272. Such fees may have been deemed unreasonable, in the sense that no fees should have been incurred by Eaglebrook in this case. However, Eaglebrook was forced to defend itself and unwind what PacifiCorp had done throughout the entire process, from the improperly notice Preliminary Injunction through the Objection to the Order Dismissing the action that came after Plaintiff's failure to attend the prior dispositive motion hearing date.

The court should consider that despite never being served with the Summons and

Complaint or the Motion for Preliminary Injunction, Eaglebrook was put into the position of having to defend on the Motion. At the April 27, 2006 hearing to set aside the preliminary injunction, as an example, it was entirely unclear what the court was hearing. In considering all possibilities, Eaglebrook had to prepare for an evidentiary hearing, but believed the court would address its objections to the Preliminary Injunction, specifically addressing the lack of service Eaglebrook raised in its pleadings. Instead, the court took evidence, which Eaglebrook had prepared for, but had yet to be served with the motion for preliminary injunction by PacifiCorp. Such confusion was created by PacifiCorp's failure to properly form the case. Therefore, Eaglebrook had to essentially prepare for any and all possible court proceedings, not just the April 27, 2006 hearing, at a great expense to Eaglebrook.

At the November 16, 2006 hearing, the court asked Eaglebrook's counsel, "[I]f you'll go ahead and prepare an order for the court, the court will go ahead and take a look at the attorney fees. And I'll go ahead and make a ruling with respect to that." R. at 306. Eaglebrook's counsel clarified that it would be submitting attorney's fees and costs in camera for the court to review, R. at 306, and Eaglebrook's counsel did submit an Affidavit of Counsel in Support of Request for Fees and Costs. R. at 198. Attached to the affidavit were all of the fee invoices and billing memoranda produced in this case up to that point in the litigation. *Id.* The invoices and billing memoranda contained detailed descriptions of each task performed by the attorneys in this case and each cost incurred. *Id.* Eaglebrook's counsel also submitted a request for additional attorney fees for having to conduct additional legal

research and for preparing the response to PacifiCorp's Objections to Order on Eaglebrook's Motion for Summary Judgment. R. at 251.

PacifiCorp failed to complain or identify to the trial court any particular issues or time that should not be awarded. Notwithstanding PacifiCorp's silence with respect to attorney fees, the trial court still did not award attorney fees even though it did find that attorney fees and costs should be awarded. R. at 280-281. At the end of the hearing on February 12, 2007, the trial court stated, "I've a pretty good idea how I am going to rule. However, there are issue of attorney's fees and the, also the whole, well, the whole issue with respect to jurisdiction and whether or not proper form was followed in this case." R. at 307.

Again, Eaglebrook submitted several affidavits with detailed billing invoices, which were to be reviewed by the trial court judge. R. at 198-219, and 268-272. Either the judge reviewed the billing statements and affidavits and concluded that all the fees were unreasonable, or the judge did not review the billing statements and affidavits and simply concluded that no fees were to be awarded.

Defendant asserts that all fees submitted to the trial court were unnecessary as a result of PacifiCorp's persistence in pursuing an improperly formed action "against good reason". However, the trial court committed patent error or abused its discretion by making Eaglebrook suffer the consequences of PacifiCorp's improper behavior and its bad faith pursuit of that action, and therefore, fees must be awarded by the Court of Appeals.

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II. Eaglebrook is Entitled to Recover Their Attorney's Fees Incurred On Appeal

“This court has interpreted attorney fee statutes broadly so as to award attorney fees on appeal where a statute initially authorizes them.” *Valcarce v. Fitzgerald*, 961 P. 2d 305, 319 (Utah 1998)(quoting *Salmon v. Davis County*, 916 P.2d 890, 895 (Utah 1996)). As a result of PacifiCorp’s frivolous appeal, Eaglebrook is entitled to recover their costs and attorney’s fees incurred on appeal. According to Rule 33(a) of the Utah Rules of Appellate Procedure, if the court determines that an appeal “is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party.” In addition, Rule 33(a) states, “The court may order that the damages be paid by the party or by the party’s attorney.”

Rule 33(b) of the Utah Rules of Appellate Procedure sets forth the definition of a frivolous appeal:

For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

In *Sanders v. Leavitt*, 37 P.3d 1052, 1060 (Utah 2001), the Utah Supreme Court found that “Plaintiff’s appeal of the dismissal of the attorney defendants was not grounded in fact, not warranted by existing law, nor based in good faith argument to extend, modify, or reverse

existing law.” The reasoning behind the *Sanders* findings was that the Plaintiff’s brief in that case offered only a general conclusory statement about the applicable issue and cited only two cases as authority. *Id.* The case law cited by the Plaintiff in that case was not helpful to the court in resolving the issues appealed against the attorney defendants. *Id.* The Plaintiff offered no authority or argument that resolved the issues before the court. *Id.* Moreover, when the Plaintiff in that case was invited to articulate at least a theory or an argument, the Plaintiff’s counsel was unable to do so. *Id.* “In short, plaintiff’s appeal of the dismissal of the attorney defendants was a waste of time and resources of all concerned.” *Id.*

As in *Sanders*, PacifiCorp’s appeal of the dismissal of PacifiCorp’s action, without prejudice, was not grounded in fact, not warranted by existing law, nor based on a good faith argument to extend, modify, or reverse existing law. PacifiCorp simply would not be able to overcome the service of process requirement found in Rule 4 of the Utah Rules of Civil Procedure. Alone, this would justify the award of fees, but PacifiCorp’s abuse of the system of procedure has continued throughout even this appeal.

PacifiCorp filed its notice of appeal on April 30, 2007. Pursuant to Rule 9(a) of the Utah Rules of Appellate Procedure, PacifiCorp’s docketing statement was due within twenty-one (21) days after it filed its notice of appeal. PacifiCorp did not file its docketing statement until June 6, 2007, which was thirty-seven (37) days after it filed its notice of appeal.

PacifiCorp’s brief was to be served within forty (40) days after the appellate court clerk gave notice that the index was transmitted from the trial court, which was initially set

for August 21, 2007. *See* Utah R. App. P. 26(a). On August 20, 2007, PacifiCorp filed an Ex Parte Motion for Extension of Time to file its brief. In its request for an enlargement of the time in which to file its brief, PacifiCorp cited Rule 22(c) of the Utah Rules of Appellate Procedure for authority to make the request. PacifiCorp stated that no enlargement of time was previously granted and that the time had not already expired for the filing of its brief. In addition, PacifiCorp stated, “This motion otherwise complies with the requirements and limitations of Paragraph (b) of Rule 22, Utah Rules of Appellate Procedure.” *See* the *Ex Parte Motion for Extension of Time*, on file herein.

The problem with PacifiCorp’s ex parte motion to extend the time to file its brief is that PacifiCorp did not comply with Rule 22 or Rule 26 of the Utah Rules of Appellate Procedure. First of all, Rule 22(b)(1) states, “Motions for an enlargement of time for filing briefs *beyond the time permitted by stipulation of the parties* under Rule 26(a) are not favored. Utah R. App. P. 22(b)(1) (emphasis added). With respect to stipulating to an enlargement of time, Rule 26(a) states, “*By stipulation* filed with the court in accordance with Rule 21(a), *the parties may extend* each of such periods for no more than 30 days.” Utah R. App. P. 26(a) (emphasis added). “No such stipulation shall be effective unless it is filed prior to the expiration of the period sought to be extended.” Utah App. R. P. 26(a). Most importantly, Rule 22(c) states the following:

Except as to enlargements of time for filing and service of briefs under Rule 26(a), a party may file one ex parte motion for enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the time has not already expired for doing the act for which the enlargement is

sought, and if the motion otherwise complies with the requirements and limitations of paragraph (b) of this rule.

Utah R. App. P. 22(c) (emphasis added). The language is clear in Rule 22(c), where it states, “Except as to enlargements of time for filing and service of briefs under Rule 26(a)...” This obviously means that a party may not file an *ex parte* motion for enlargement of time when the enlargement of time is for the filing and service of briefs.

Notwithstanding the clear language of Utah Appellate Rule 22(c), PacifiCorp, or its counsel, did not comply with Rule 22(c) and filed an *ex parte* motion for enlargement of the time for the filing and service of its brief. In its *ex parte* motion for enlargement of time, PacifiCorp stated that it was requesting the enlargement pursuant to Rule 22(c) of the Utah Rules of Appellate Procedure. See the *Ex Parte Motion for Extension of Time*, on file herein.

At this point, words cannot describe the amazement that Eaglebrook’s counsel has experienced in dealing with PacifiCorp throughout this matter. At every turn, PacifiCorp has made up its own rules of procedure and it seems it has been given a pass at every turn as well. Now, Eaglebrook is here on appeal, because of PacifiCorp’s failure to comply with the Utah Rules of Civil Procedure, and now, on appeal, PacifiCorp has failed to comply with the Utah Appellate Rules of Procedure. Even though the failure to comply with Rule 22(c) of the Utah Appellate Rules of Procedure may not be a crucial failure to PacifiCorp’s appeal, the cumulative effect of PacifiCorp’s fabian policy in carrying out the instant litigation is beyond the pale and must be addressed by this court.

Eaglebrook did not oppose the ex parte motion to enlarge the time for PacifiCorp to file its brief. Eaglebrook wanted to see PacifiCorp's brief. PacifiCorp was given until September 4, 2007 to file its brief. However, September 4, 2007 came and went without any brief being filed by PacifiCorp. Moreover, on September 17, 2007, this Court filed an Order of Dismissal, on file herein, wherein this Court stated the following:

For failure of Appellant to file the Appellant's brief within the time permitted by Utah R. App. P. 26(a), which time expired on September 4, 2007, IT IS HEREBY ORDERED that the appeal is dismissed, see Utah R. App. P. 3(a); provided, however, that if the Appellant's brief is submitted within ten (10) days from the date hereof, the appeal shall be thereby reinstated without further order of the court.

Even though PacifiCorp was given an additional ten days beyond the extended time period for filing its brief, PacifiCorp never filed its brief, and, as a result, PacifiCorp's appeal was dismissed. One can only wonder why PacifiCorp did not file its brief. PacifiCorp's counsel is a partner at one of the largest law firms in the state of Utah. There is no excuse for not filing and serving a brief when you are the party that filed the appeal and conducted the appeal up to the point of asking for an extension of time to file a brief.

Even though PacifiCorp tried to argue that Eaglebrook had waived service, Eaglebrook was successful in obtaining a dismissal of PacifiCorp's action below as PacifiCorp failed to serve process in a timely manner. Even though it knew it failed to serve process and that its action was meritless, PacifiCorp pushed ahead and pursued its action in bad faith. PacifiCorp's appeal has clearly been imposed for the same purposes as below and

for the added purpose of delaying the inevitable. However, once it came time to actually file a brief, PacifiCorp seems to have quietly backed away. The silence is stunning and only proves that its appeal was without merit and therefore frivolous. Therefore, this Court should exercise its discretion and award Eaglebrook their attorney's fees and costs on appeal.

CONCLUSION

The trial court correctly found that an award of attorney fees and costs was proper in dismissing PacifiCorp's action. However, the trial court committed patent error or abused its discretion by not awarding attorney fees to Eaglebrook pursuant to Utah Code Ann. § 78-27-56, as PacifiCorp's action was meritless and asserted in bad faith. As a result, that part of the Order of the trial court that did not award fees should be reversed and Eaglebrook's reasonable attorney fees should be awarded.

This Court properly dismissed PacifiCorp's appeal. PacifiCorp's appeal was not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. It is highly unlikely that this Court would overturn the due process requirements of Rule 4(b)(i) of the Utah Rules of Civil Procedure. Thus, PacifiCorp's appeal has clearly been imposed for the same purposes as below and for the added purpose of delaying the inevitable. Therefore, this Court should exercise its discretion and award Eaglebrook their attorney's fees and costs on appeal.

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RESPECTFULLY SUBMITTED this 26th day of November, 2007.

ROB GRAHAM & ASSOCIATES

By  _____

Robert C. Graham

Nevada State Bar No. 4618

Appearing *Pro Hoc Vice*

Adam P. McMillen

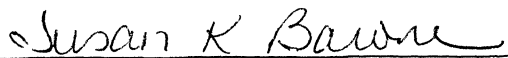
Utah State Bar No. 11063

Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the BRIEF OF CROSS-APPELLANTS to be mailed First Class, United States mail, postage prepaid, this the 26th day of November, 2007 to the following person at the address listed below:

Anthony L. Rampton, Esq.
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An Employee of Rob Graham & Associates